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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 1099

BOB FRED ASHE,
Petitioner,

vs.

HAROLD R. SWENSON, Warden,
Missouri State Penitentiary,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

QUESTION PRESENTED

In the opinion of the respondent, the question presented is: May the State try a defendant for robbery if the defendant has been acquitted previously on a charge of robbery, involving a different victim and different property and different issues, when each alleged robbery is part of the same episode?

STATEMENT

We adopt petitioner's statement of facts.

SUMMARY OF ARGUMENT

The petitioner was tried for two separate crimes; first a robbery of Knight, and, then, the robbery of Roberts. While both robberies are part of a single episode, the law of Missouri treats them as separate crimes for which there can be multiple punishments and multiple trials.

At the first trial, petitioner was acquitted for the robbery of Roberts. Missouri then tried and convicted him for the robbery of Knight.

The petitioner claims that he was twice put in jeopardy, contrary to the prohibition of the Fifth Amendment because of the acquittal at the first trial. It is his contention that even if the two robberies are separate offenses, the first jury based its verdict on the fact he was not present at the scene of the crimes. He argues the State is estopped from relitigating this issue which is essential if the conviction at the second trial is to stand.

It is the position of the State of Missouri that the double jeopardy protection of the Fifth Amendment does not apply to the factual situation presented in this case.

The Fifth Amendment prohibition against double jeopardy is codification of the common law. According to common law, petitioner would not have been twice placed in jeopardy. The common law would recognize the separateness of the two offenses.

The petitioner also asks this court invalidate his conviction on due process grounds. If the court were to do this, it would have to expressly overrule its prior holding in *Hoag* v. *New Jersey*, 356 U.S. 464. Recognizing that

at some point competitive trials could amount to a denial of due process, there is nothing in this case to show fundamental unfairness or an intention on the part of the State to harass or wear down the petitioner.

Petitioner also asks the court to apply the doctrine of collateral estoppel in criminal trials. We do not believe that collateral estoppel is applicable to the facts of this case.

It is not possible from the record to tell what facts the first jury found in the petitioner's favor. To apply collateral estoppel, the court would have to hypothesize that the first jury determines the "identity" issue, though that is only one of many other possible jury findings that would support the jury's decision to acquit. Even if collateral estoppel could be applied, this court has never held its application to be constitutionally mandatory. We would characterize collateral estoppel as a procedural rule that should not be elevated to the level of a fundamental constitutional right.

ARGUMENT

The State consistent with due process may try an individual who previously has been acquitted of the robbery of one victim for the robbery of another victim though both crimes are alleged to have occurred as part of one spisode.

A. A state may treat each robbery, though part of one episode, as a separate and independent crime; therefore, the defendant is not twice put in jeopardy for the same offense when he is tried at separate trials for each robbery.

1. When the petitioner was tried for the robbery of Roberts, this was not a trial for the robbery of Knight, the robbery of Knight being a separate offense.

Missouri may treat the robbery of one individual and the robbery of another individual as two independent criminal offenses notwithstanding the fact that both crimes took place as part of one episode. This view is justified because robbery in Missouri (Section 560.120, RSMo [1959]) has as an element an act that puts the victim in fear of violence against his person or an act that actually results in violence to the victim. Examining the interest protected by the statute, the nature of the harm, and the intent of the defendant required to commit the crime, it is reasonable to conclude when there are two victims, there are two crimes. This is what the Missouri Supreme Court has found the law of the state to be, *State* v. *Williams*, Mo., 263 S.W. 195, 197 (1924). The Missouri court reaffirmed this position when the petitioner appealed his conviction (A. 225).

In the present case the record clearly establishes that the State based its two separate robbery charges on testimony showing separate acts of violence against each victim (Donald Knight (A. 17), Ray Roberts (A. 136)) and

that individual property of each victim was taken from his person (Knight (A. 16, 17), Roberts (A. 136)).

It is the position of the State that because of the separateness of the offenses the defendant has not twice been put in jeopardy for the same offense. This Court has held that whether one act may constitute multiple offenses is not a constitutional question, *Ladner* v. *United States*, 358 U.S. 169, 173, 3 L.Ed.2d 199, 79 S.Ct. 209 (1958).

The wisdom of the determination of the Missouri Supreme Court that the robbery of two individuals constitutes two offenses cannot be challenged in this proceeding. The judgment of the highest state court is conclusive as to construction and application of state statutes and constitutions. *Senn* v. *Tile Layers Protective Union Local No. 5*, 301 U.S. 468, 481, 81 L.Ed. 1229 (1937).

2. The Fifth Amendment prohibition of twice putting an individual in jeopardy for the same offense represents the codification of the common law prohibition against double jeopardy, and is not applicable when there are multiple trials for multiple offenses.

The maxim "that no man is to be brought into jeopardy of his life more than once for the same offense" is an integral part of the common law. 4 Blackstone, *Commentaries on the Law of England* (1790). It appears that the intent of the drafters of the Fifth Amendment was to elevate this principle to an express individual right. History indicates that this provision, which had previously been embodied in several state constitutions, was not subject to a great deal of debate. Madison's original draft, providing that defendant could only be put on trial once, was modified to leave no doubt that a defendant could appeal a conviction just as he could a common law. The double jeopardy provision at least preserved the common law as it was then known. Justice Story was of this view:

> "* * * for the privilege thus secured is but a constitutional recognition of an old and well established maxim of the common law: and, therefore, we are to resort to the common law to ascertain its true use, interpretation, and limitations. * * *" *United States* v. *Gibert*, 2 Sumner 19, 38, 25 Fed. Cas. 1287, 1294 (No. 15204) (C. C. Mass. 1834).

We can find nothing to support the proposition that the Fifth Amendment expanded the common law on double jeopardy. (See, dissenting opinion of Justice Frankfurter in *Green* v. *United States*, 355 U.S. 184, at 200-204, 2 L.Ed.2d 199, 78 S.Ct. 221 (1957).)

Common law recognized the distinction between double jeopardy for the same offense and jeopardy for different offenses. For example, in *King* v. *Pedley*, 1 Leach 242, 168 Eng. Rep. 224 (1782), the defendant was acquitted of arson because the person named in the indictment as being in possession of the house burned did not in fact have possession. The court then ordered him tried on a charge of arson for burning the house of the actual occupier.

The leading expression of the common law position on what constitutes double jeopardy is as follows:

> "* * * Unless the first indictment were such as the prisoner might have been convicted upon by proof of the facts contained in the second indictment, an acquittal on the first indictment can be no bar to the second. * * *" *Rex* v. *Vandercomb and Abbot*, 2 Leach 708, 720, 168 Eng. Rep. 455, 461 (1796).

This principle for determining if a defendant has been twice placed in jeopardy is often referred to as the "same evidence" test. While the *Vandercomb* case was decided shortly after the Fifth Amendment was ratified, it merely was articulating the law as it existed and was not promulgating a rule on a case of first impression.

This test has been followed by the United States Supreme Court, *Blockburger* v. *United States*, 284 U.S. 299, 304, 76 L.Ed. 306, 52 S.Ct. 312 (1931), *Ebeling* v. *Morgan*, 237 U.S. 625, 631, 632 (1915) (slashing separate mail bags constitutes separate offenses though part of one transaction).

Application of the test to the facts of this case is quite simple. At no time during the first trial where the petitioner was in jeopardy on charges of the robbery of Knight could he be said to be in jeopardy for the robbery of Roberts. This is true although evidence brought out at that trial might clearly show he was guilty of robbing Roberts. Therefore, when tried for the robbery of Roberts, he was in jeopardy for that offense for the first time. The evidence required at this trial to convict would not be the evidence required at the first trial.

The "same evidence" test has been widely employed. *Wharton's Crim. Law and Procedure*, §144, Anderson, Ed. (1957). Most states which have employed the "same evidence" test have constitutional provisions similar to the Fifth Amendment and even those that have no express provisions recognize double joepardy as a common law right, Wharton, §136. Though the Double Jeopardy clause of the Fifth Amendment just recently was held applicable to the states, *Benton* v. *Maryland*, 395 U.S. ....., 89 S.Ct. 2056 (1969), it would represent a radical departure from existing state practice to conclude that application of the "same evidence" test would be unconstitutional under the Fifth Amendment.

The prohibition of the Fifth Amendment is just as strong in preventing multiple punishment for the same offense as it is for multiple trials for the same offense. When a defendant is charged with committing two crimes, it would not be a violation of the Fifth Amendment to inflict

punishment for each crime he was found guilty of, *Gore* v. *United States*, 357 U.S. 386, 2 L.Ed.2d 1405, 78 S.Ct. 1280 (1958). It would be no more of a violation to try him for each alleged crime at a separate trial. *Ciucci* v. *Illinois*, 356 U.S. 571, 2 L.Ed.2d 983, 78 S.Ct. 839, reh. den. 357 U.S. 924, 2 L.Ed.2d 983, 78 S.Ct. 839 (1958).

It has occasionally been urged to this court that the Fifth Amendment ban on double jeopardy should be applied with narrow literalness. We do not argue the amendment should be so construed. In *Ex parte Lange*, 18 Wall. (U.S.) 163 (1874), the court held:

> "It is not necessary in this case to insist that other cases besides those involving life or limb are *positively* covered by the *language* of this [Fifth] amendment; * * *
>
> "It is very clearly the *spirit* of the instrument to prevent a second punishment under judicial proceedings for the same crime, so far as the common law gave that protection. * * *" (Italics in original).

This is consistent with our position. At common law and in many states today, there are as many crimes as there are victims when the essence of an offense is a crime against the person. The fact that they are multiple offenses permits the State to try the defendant at separate trials without a defendant being twice put in jeopardy for the same offense. No right of the petitioner under the Fifth Amendment has been violated. *Bartkus* v. *Illinois*, 359 U.S. 121, 3 L.Ed.2d 684, 79 S.Ct. 676 (1959), reh. den. 360 U.S. 907, 3 L.Ed.2d 1258, 79 S.Ct. 1283.

B. The facts of this case do not show trial for the second robbery after acquittal for the first robbery to be fundamentally unfair.

We understand the petitioner to argue that if the double jeopardy clause of the Fifth Amendment does not

taint his conviction, that his conviction was nevertheless a violation of his right to due process. This court has already rejected such contention in a case virtually identical on its facts, *Hoag* v. *New Jersey*, 356 U.S. 464, Anno. 2 L.Ed.2d 913, 78 S.Ct. 829, reh. den. 357 U.S. 933, 2 L.Ed.2d 1375, 78 S.Ct. 1366 (1958).

The petitioner would have the court distinguish that case from the present controversy in that (1) the state court, in *State* v. *Hoag*, 21 N.J. 496, 122 A.2d 628 (1956), made a determination that the jury at *Hoag's* first trial did not necesarily acquit him because of the "identity" issue; and (2) the prosecution in *Hoag* was surprised at the first trial by the failure of state's witnesses to testify as expected.

We do not consider these two points to be distinguishing features. Looking at the first contention, the Supreme Court of New Jersey did not undertake an evaluation of the record and then conclude that it could not determine that the question of identity was not found in *Hoag's* favor. Rather the state court based its holding on the ground that no examination of the record in a criminal trial could establish the basis of a jury's verdict of "not guilty." The majority of the New Jersey Supreme Court then went on to state, 21 N.J. at 505, 122 A.2d at 632:

> "* * * Since it does not appear whether the acquittal was based on the determination of the question as to which the estoppel is sought in the second trial, the first verdict is not conclusive in the second trial. * * *"

A majority of this court accepted that conclusion of the New Jersey Supreme Court. It rejected the notion that it could by an examination of the record determine why the jury acquitted Hoag at the first trial. Mr. Justice Harlan wrote, 356 U.S. at 472:

> "* * * For we would have to embark on sheer speculation in order to decide that the jury's verdict at the earlier trial necessarily embraced a determination favorable to the petitioner on the issue of 'identity.'"

The Missouri Supreme Court took much the same position when the petitioner appealed. The tenor of its opinion was that it could not examine the trial record and determine what led the jury to decide as it did (A. 223). It might be argued that the Missouri Supreme Court went further and rejected entirely the concept of collateral estoppel as applied to criminal cases. This court does not need to decide whether the Missouri Supreme Court was correct in that position. All that it need hold is that when a jury is instructed that it must affirmatively determine several factors in order to return a verdict of guilty, then an appellate court need not speculate as to which of these factors the jury failed to find when it acquitted the defendant when faced with deciding whether the jury's decision to acquit may be used collaterally.

It is not uncommon for courts to refuse to permit a defendant to use a prior acquittal collaterally to establish an alibi at a subsequent trial. See, e.g., *People* v. *Ulrich*, 30 Ill.2d 94, 194 N.E.2d 180 (1963); *State* v. *Robinson*, 262 Minn. 79, 114 N.W.2d 737, cert. den. 83 S.Ct. 26, 371 U.S. 815, 9 L.Ed.2d 56 (1962); *State* v. *Barton*, 5 Wash. 234, 105 P.2d 63 (1940). If a court can examine the trial record and determine the underlying findings implicit in the verdict, juries are superfluous except as constitutional anachronisms.

Petitioner also contends that the failure of a witness to give excepted testimony justified the second trial in the *Hoag* case, but this factor is absent from the present case. How can a direct denial by a witness that *Hoag* was the robber be a justification of a new trial and the inability

of several witnesses to give positive testimony in the present case be held not to provide the same justification? Would Missouri have been better off if the witnesses had made positive denials that petitioner was involved? This is a distinction without a difference.

In the *Hoag* case, the witnesses who testified unfavorably at the first trial were not called at the second trial, 21 N.J. at 499, 122 A.2d at 630; yet there was no doubt that they were at the scene of the second robbery. Missouri called all the witnesses who were at the scene of the crime at the second trial who gave testimony at the first trial except for McClendon, one of the victims for whose robbery petitioner was not tried (A. 22-32). The failure of the state to call McClendon at the second trial was a tactical decision and cannot be said so fundamentally unfair as to be a denial of due process. His testimony at the first trial was equivocal—but only because of that factor can it be found helpful to the petitioner. It did not expressly exonerate the petitioner. There is nothing in the record to show that petitioner could not have called McClendon as his own witness if he thought his testimony would have been helpful.

We do not deny that some of the witnesses at the second trial gave more favorable testimony from the state's point of view than they gave at the first trial. No doubt the prosecutor felt the state had a provable case on the first charge and, when he lost, he did what every good attorney would do—he refined his presentation in light of the turn of events at the first trial. There appears to be in the petitioner's argument suggestive undertones that the identification testimony at the second trial was manufactured. If he is arguing this, there is nothing in the record to support such a contention. The juries, of course, could hear any claims of inconsistencies and could give them such weight as they saw fit.

If, as respondent urges this court to hold, two trials are not *per se* a violation of due process, the facts of this case do establish that the two trials in this case represent an attempt on the state's part to wear out the accused with a multitude of trials. It is significant that when the petitioner appealed his conviction the Missouri Supreme Court recognized that multiple trials could be unconstitutional when it repeated the cautionary note of the New Jersey Superior Court:

> "* * * 'Assuredly our prosecutors are aware that the concept of double jeopardy is designed to prevent the government from unduly harassing an accused, and we are confident that they will not resort unfairly to multiple indictments and successive trials in order to accomplish indirectly that which the constitutional interdiction precludes.' " (A. 226).

In the present case, there was no delay or a denial of a speedy trial. The second trial ended within two months after the first one commenced (A. 1).

The petitioner knew of each charge against him before the first began. He made no effort to have the charges joined and tried together. It might be that he preferred not to risk the possibility that a single jury might find him guilty of each crime and subject him to a harsher penalty because of this.

The fact that the two verdicts are possibly inconsistent is not objectionable. This often happens when separate juries consider related fact situations. *Dunn* v. *United States*, 284 U.S. 390, 80 A.L.R. 161, 52 S.Ct. 189, 76 L.Ed. 356 (1932).

The conclusion is inescapable that to decide this case in favor of the petitioner the court would have to overrule its prior holding in *Hoag*. We find no new justification for such a course of action.

C. The doctrine of collateral estoppel does not apply to the facts of this case.

Petitioner has urged that the concept of double jeopardy incorporates the doctrine of collateral estoppel. We have previously argued that the Fifth Amendment prohibition is very specific and that in this case it has not been transgressed. But even taking a broad view of the Fifth Amendment and holding that collateral estoppel does apply, the facts of this case are such that collateral estoppel cannot be applied here.

The doctrine of collateral estoppel has often been stated in the following language.

> "(1) Where a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties in a subsequent action on a different cause of action. . . .
>
> "(2) A judgment on one cause of action is not conclusive in a subsequent action on a different cause of action as to questions of fact not actually litigated and determined in the first action." Restatement, Judgments, §68.

The doctrine requires that there be an express determination of specific facts and that these facts be essential to the actual judgment pleaded as an estoopel. Scott, *Collateral Estoppel by Judgment*, 56 Harvard Law Review 1 (1942). The one, and only, fact determined at Petitioner's first trial was that he did not rob Donald Knight. That fact does not preclude inquiry as to whether he robbed Roy Roberts. (The first jury informally added to the general verdict of not guilty the words " 'due to insufficient evidence' " (A. 90). This is not significant. It would have been implicit in the verdict had it not been added.)

Comment "p" and the illustration following it of the Restatement of Judgments, §68 demonstrate collateral estoppel does not operate in a case such as the present one, where the second trial is on a separate cause of action and the facts which the state is sought to be estopped on are merely "evidentiary." The comment and illustration state:

> "p. *Evidentiary facts.* The rules stated in this Section are applicable to the determination of facts in issue, but not to the determination of merely evidentiary facts even though the determination of the facts in issue is dependent upon the determination of the evidentiary facts.
>
> "*Illustration*:
>
> "14. A brings an action against B for breach of contract. B denies that he made the alleged contract. At the trial A testifies that on a certain day B signed the contract in New York. C testifies that he saw B in London on that day. Verdict and judgment for B. Thereafter A brings an action against B alleging that B assaulted A on the same day in New York. The judgment in the prior action does not preclude A from proving that B was in New York on the day in question."

The petitioner cites in his brief, at page 31, Judge Learned Hand's famous discussion of estoppel in *The Evergreens* v. *Nunan*, 141 F.2d 927 (2nd Cir. 1944). The petitioner argues that under the reasoning of that case Missouri should be estopped from litigating in the second trial for the issue of the accused's identity because that factor had been determined in the accused's favor at the first trial and was not a "meditate" question. We disagree. Identity was a "meditate" question at both trials. The "ultimate" question at each trial was, did the petitioner rob the particular victim charged by the State. Anno., 142 A.L.R. 1243, 152 A.L.R. 1243.

The majority decision in *Hoag*, supra at 470, found that collateral estoppel was not applicable on facts similar to this case. There is no reason why the same conclusion should not be reached in this case.

It is not necessary for the court wholly to accept with our characterization of the doctrine of collateral estoppel set forth, above, to find for the respondent. The court may instead hold the collateral estoppel as it pertained to this case as not constitutionally required.

D. Even if it could be said collateral estoppel may apply to this case, its application is not constitutionally mandatory.

No case has been found where this court has expressly stated that the doctrine of collateral estoppel is constitutionally mandatory in state criminal prosecutions. The petitioner argues that *Sealfon* v. *United States*, 332 U.S. 575, 68 S.Ct. 237, 92 L.Ed. 180 (1948), represents an application of collateral estoppel in a criminal case. In that case the court did not deal with the constitutional question. The opinion, at 576, states a narrow issue decided—namely whether "an acquittal of conspiracy to defraud the United States precludes a subsequent prosecution for commission of the substantive offense on the facts herein involved."

Even if *Sealfon* is given a broad construction, it should not be held to rest on a constitutional foundation. It should be viewed as applicable only to federal criminal trials. The Supreme Court may judicially supervise the administration of criminal justice in the federal courts and provide guidance as to federal criminal procedure without elevating the policies that promulgate to the level of constitutional rights, *McNabb* v. *United States*, 318 U.S. 332, 340, 87 L.Ed. 819, 63 S.Ct. 608 (1942), reh. den. 319 U.S. 784, 87 L.Ed. 1727, 63 S.Ct. 1322.

Petitioner suggests in his brief, at page 33, that *United States* v. *Oppenheimer*, 242 U.S. 85 (1916), this court relied upon the principle of collateral estoppel in federal trials to breathe life into the double jeopardy clause of the Fifth Amendment. The facts of that case were significantly different than those of the present case. *Oppenheimer* had previously pleaded the statute of limitations barred the indictment, and, consequently, he was acquitted. Another case, not involving *Oppenheimer*, established that the statute of limitations did not apply. When the government then attempted to reprosecute *Oppenheimer*, the United States Supreme Court held that the first acquittal was a bar to reprosecution. The feature distinguishing that case from the present one was that both indictments in *Oppenheimer* were for the same offense, while the petitioner in this case was tried for separate offenses. The holding in *Oppenheimer* is not based on collateral estoppel but *res judicata*.

It has been suggested that collateral estoppel as it is applied in civil cases should be applied in criminal cases. One reason that might be advanced in opposition to this view is that in civil cases, through discovery and in pleading, the parties narrow the issues involved so that a jury verdict examined in light of the discovery and pleadings can be held to support certain findings of fact—though these findings are not an explicit part of the verdict. In a criminal case, discovery does not operate against the defendant and he cannot be required to plead specifically in reply to the State's allegations. It is not unreasonable or fundamentally unfair that a state not be precluded from establishing, at a second trial for a separate offense, facts the first jury may not have (but could have) found.

In a civil trial both parties would be bound by the facts established at a previous trial. In a criminal trial the State has to prove anew each element of the case to the

satisfaction of the jury. The mutuality of the estoppel is, therefore, lacking in a criminal trial. *Rouse* v. *State*, 202 Md. 481, 97 A.2d 285 (1953), cert. den. 74 S.Ct. 104, 346 U.S. 865, 98 L.Ed. 376.

Collateral estoppel should be viewed as a procedural device and not made constitutionally mandatory on the states. See *Abbate* v. *U. S.*, 359 U.S. 187, 200, N. 4, 3 L.Ed.2d 729, 79 S.Ct. 666 (Brennan, J., Sep. Op.).

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the Court below, denying the Writ of Habeas Corpus, should be affirmed.

Respectfully submitted,

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